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The Classical Islamic Law of *Waqf*: A Concise Introduction

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Abstract
The purpose of this article is to provide a concise and brief introduction to the classical Islamic law of *waqf*. This study is based on the *Fiqh* literature of four Sunni schools of thought. The primary focus is on the Hanafi *Fiqh*, however, representative texts of the other schools have also been taken into account. There are three major findings in this article. First, the law contained in *Fiqh* texts is incomplete because it does not encompass *'urf* (custom) and *qānūn* (imperial decrees). Custom is recognized in these texts in support of *Fiqh*, but *qānūn* is totally missing despite references to the power of rulers regarding certain provisions of *waqf* law. Second, the legal theory is inconsistent, as the majority of Jurists hold that the ownership of a founder terminates with the creation of a *waqf*. However, not only the founder and his legal heirs maintain a limited proprietary interest in *waqf* property; the *waqf* also dissolves with the apostasy of its founder. Third, family *awqāf* (pl. of *waqf*) come into direct conflict with the law of inheritance and the law of gifts. However, the testamentary *waqf* and *waqf* during terminal illness are subservient to inheritance law, and jurists have tried to harmonize *waqf* law with inheritance law whenever an opportunity arose.

Keywords
Fiqh, *waqf*, custom, imperial decrees, inheritance law

1. Introduction

Waqf (pl. *awqāf*) is described as the most important institution, which provided the foundation for Islamic civilization, as it was interwoven with the entire religious life and the social economy of Muslims.[1] From mosques,

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[1] P.G. Hennigan, *The Birth of a Legal Institution: The Formation of the Waqf in Third-Century A.H. Hanafi Legal Discourse* (Leiden: Brill, 2004) xiii; S.A. Ali, *Mahommedan Law* (Lahore: Law Publishing Company, 1976 (first published 1892)) 192-193. Colin Imber

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schools and hospitals to markets and inns, most of the public sector was financed through *awqāf*. The *waqf* provided the only permanent organisational form under Islamic law which did not explicitly have the concept of impersonal juristic personality.[2] Therefore, the *waqf* was the most suitable legal form for financing long-lasting services. Small wonder if the entire sector of public services in the Muslim world was managed through *awqāf* before the advent of the modern state in the twentieth century.[3] Interestingly, the *waqf* was not limited to the provision of public services. A large number of *waqf* properties were reserved in favour of the founders and their family members, generation after generation. However, even in such private *awqāf*, the ultimate beneficiaries were the poor of society or public services. Therefore, the *waqf* as an institution encompasses both private and public functions.[4]

The scale of the involvement of the *waqf* in Muslim societies was enormous. Between one-half and two-thirds of the landed property in the Ottoman Empire was held by *awqāf* in the early twentieth century. At the same time, one-half of the land in Algeria and one-third in Tunisia was made *waqf*. A similar percentage of real estate was also vested in *awqāf* in Egypt.[5] The reason for this enormous proliferation of *awqāf* is said to be

goes to the extent of stating that without public *awqāf*, Islam and Islamic society could have neither functioned nor survived. C. Imber, *Ebu's-su'ud: The Islamic Legal Tradition* (Edinburgh: Edinburgh University Press, 1997) pp. 141-142.

[2] Similar institutions existed before the advent of Islam amongst the Byzantines in the form of *piae causae*, Romans in the form of *res sacrae* and *fidei commissum*, Jews in the form of *hekdesh*, Persians in the form of *pat rasan* or *ruwanagan* and Arabs in the form of *haram* and *hima*. For an interesting discussion on the origins of *waqf* and the impact of these institutions on it, see P.G. Hennigan, *supra* note 1, pp. 50-70. See also Randi Carolyn Deguilhem-Schoem, *History of Waqf and Case Studies from Damascus in Late Ottoman and French Mandatory Times*, PhD thesis, New York University (1986) pp. 49-70.

[3] G. Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh: Edinburgh University Press, 1981) p. 40; T. Kuran, "The Provision of Public Goods under Islamic Law: Origins, Impact, and Limitations of the *Waqf* System", *Law & Society Review* 35 (2001) 841, 842.

[4] It is not possible to translate the term "*waqf*" with a single English word because it conveys a myriad of meanings. Sometimes a *waqf* is translated as a 'charitable trust', which has a public dimension and at other times it is translated as an 'endowment', which resembles a 'will' or 'settlement' that has a private dimension. G.C. Kozlowski, *Muslim Endowments and Society in British India* (Cambridge: CUP, 1985) pp. 1-2.

[5] D.S. Powers, "Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India", (1989) 31 *Comparative Studies in Society and History* 535, 537-538. Heffening mentions slightly different figures. In the former Turkish

the precarious protection of property rights in Muslim societies. Firstly, the state was the legal owner of most of the land. Secondly, confiscation was a state policy to the extent that historians specifically mentioned the rulers who did not confiscate properties.[6] In these circumstances, the *waqf* provided a mechanism for the preservation of property for family members. By making a *waqf* of his property in favour of his family or some public cause the founder divested himself of the legal ownership. As the *waqf* was legally a charitable institution, rulers could not lay their hands on it without invoking public anger.[7]

This study intends to provide a brief description of Islamic law of *waqf* derived from the classical *Fiqh* literature. The primary focus is on the Hanafi School but comparison is also made with other schools where necessary. The *Fatāwā al-'Ālamgīriyya* (also known as *Fatāwā al-Hindiyya*)[8] and the *Hidāya* provide the primary source for this study. The former was compiled upon the order of Emperor Aurangzeb 'Ālamgīr and the latter was written by a famous Hanafi jurist Marghīnānī.[9] Other classical texts of

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empire three quarters of the whole arable land; towards the end of nineteenth century half of Algiers; in 1883 one-third in Tunis and in 1927 in Egypt one-eighth of the cultivated soil comprised *waqf*. W. Heffening, "Wakf", *Encyclopaedia of Islam*, 1st edn. (1934) 1100.

[6] Makdisi, *supra* note 3, 40; B. Johansen, *The Islamic Law on Land and Tax Revenue: The Peasants' Law of Property Rights as Interpreted in the Hanafite Legal Literature of the Mamluke and Ottoman Periods* (New York: Croom Helm Ltd., 1988).

[7] M. Gil, "The Earliest *Waqf* Foundations", *Journal of Near Eastern Studies* 57 (1998) 125, 128. The charitable (*sadaqa*) element of *waqf* conferred sanctity upon the *waqf* property. It was the sanctity attached to the *waqf* property which protected it from either outright confiscation or heavy taxation. This understanding is endorsed by the synonymous expressions of *waqf* which are found in classical texts such as *sadaqa muraqqāh* (reserved charity), *sadaqa jāriya* (unceasing charity) and *sadaqa muḥarrama* (sacred charity) and the traditions of the Prophet that sanctify the *sadaqa*. Moreover, the majority of jurists regard *waqf* property as the property of God reserved for the benefit of the poor.

[8] The *Fatāwā al-'Ālamgīriyya*, as the name shows, was not a compilation of *fatāwā* (juristic opinions), rather it was a compilation of the opinions of various Hanafi scholars extracted from *Fiqh* books. J. Schacht, "On the Title of the *Fatāwā al-'Ālamgīriyya*", in: C. Bosworth (ed.) *Iran and Islam* (Edinburgh: Edinburgh University Press, 1971) p. 475.

[9] The *Hidāya* is one of the most popular books of the Hanafi law, which was widely commented upon. Four famous commentaries include *Al-Nihāya* by Al-Sighnāqi (written in 7th/13th); *Al-'Ināya* by Al-Bābartī (d. 786/1384); *Al-Wiqāya* by Mahmūd ibn Ṣadr al-Sharī'a (7th/13th); and *Al-Kifāya* by Al-Kākūrī (8th/14th). These commentaries were further commented upon by later jurists. The *Hidāya* itself is a shorter commentary on Marghīnānī's own book, *Bidāyat al-Mubtadī* that is based on Al-Qudūrī's *Mukhtaṣar* and Al-Shaybānī's *Al-Jāmi' al-ṣaghīr*. The *Kifāyat al-Muntahī* is a large commentary in eight

Sunni Schools and treatises of later scholars have also been consulted for this study.

2. Fundamentals of the Classical Islamic Law of *Waqf*

Literally, *waqf* means detention and it stems from the Arabic root verb '*waqafa*', which means 'to stop' or 'to hold'.[10] Under Islamic law, it refers to an institutional arrangement whereby the founder endows his property in favour of some particular persons or objects. Such property is perpetually reserved for the stated objectives and cannot be alienated by inheritance, sale, gift or otherwise. In the organisational structure of a *waqf*, there are three major parties. The founder is called the *waqif*, who creates a *waqf* either by writing or pronouncing his intention to make a *waqf* of his property in favour of the beneficiary or beneficiaries, called *mawqūf 'alayh*, who, according to some jurists must be capable of owning property. A *waqf* can also be created for a specific purpose, *e.g.*, promotion of religious education or the welfare of the needy and the poor. The third party is the administrator, called the *mutawalli*, who administers the *waqf* according to the conditions laid down by the founder. The *qāḍī* performs the duty of supervision over the *waqf* by keeping a check on the administrator. A specialised government department (*diwān*) to govern public *awqāf* is also found as early as the Umayyad dynasty (661–750 AD).

The institution of *waqf* is not mentioned in the Qur'ān, which is considered the primary source of Shari'a.[11] However, the general verses that emphasise charity are taken to be the legal authority from the Qur'ān for the validity of the *waqf*.[12] There are traditions of the Prophet and his Companions who established the *waqf* as *ṣadaqa* (charity). Although such traditions provided the basis for *waqf* law, the detailed law was developed by Jurists on the basis of secondary sources of Islamic law such as *qiyās* (analogy), *ijmā'* (consensus), *istiḥsān* (juristic preferences), *istiṣḥāb* (continuity)

volumes. W. Heffening, 'Al-Marghinānī', *Encyclopaedia of Islam*, 2nd edn. (2011) http://www.brillonline.nl/subscriber/entry?entry=islam_COM-0685 (accessed 10 May 2011).

[10] Al-Fayyūmī, *Al-Miṣbāḥ al-Munīr* (Beirut: Dār al-Mu'ārif, 1977); H. Wehr, *A Dictionary of Modern Written Arabic* (New York: Spoken Language Services, Inc., 1976).

[11] The derivatives of the word '*waqf*' have been used in the Qur'ān in these verses: *Al-An'ām*: 27; 30; *Saba'* 31; *Al-Ṣāffāt*: 24.

[12] See, *e.g.*, *Āl 'Imrān*: 92 and *Al-Baqara*: 177, 215, 267.

and *'urf* (custom)[13] and reflects the socio-political developments of the time. The principle of *istiṣlāḥ* (public good) was also applied in the later periods in order to legalise new practices such as cash *awqāf*.[14]

Muslim jurists dealt with the law of *waqf* at length in their corpuses of *Fiqh* and every compendium of Islamic law of all major schools contains a separate chapter on the law of *waqf* or *ḥabs* (as it is known in the Mālikī and Shāfi'ī Schools). Separate treatises on *waqf* law are also found as early as the ninth century (third century AH).[15]

2.1. *Definition of* Waqf *and the Ownership of* Waqf *Property*

Waqf or *tabbīs* or *tasbīl* conveys the meaning of detention from disposal. These three are the *ṣarīḥ* (explicit) words for the *waqf*. *Ṣadaqa*, *taḥrīm* and *ta'bīd* are the implicit expressions for it. *Ṣadaqa* is also used for *zakāt* and *ḥibāt* (pl. of *ḥiba* means gift); *taḥrīm* and *ta'bīd* are also used for other things such as *ẓihār*[16] and *aymān* (oaths) and are not exclusive for the *waqf*. Therefore, in order to imply a *waqf* by the use of the last three expressions, they must be accompanied with other words, like *ṣadaqa mawqūfa*, *ṣadaqa maḥbūsa*, *ṣadaqa muḥarrama* or *ṣadaqa mu'abbada*.[17]

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[13] W. Al-Zuḥaylī, *Al-Fiqh al-Islāmī wa Adillatuhu* (11 vols., Dār al-Fikr, 2004) vol. 10, 7603; Muṣṭafā Aḥmad Al-Zarqā, *Aḥkām al-Awqāf* (2nd edn., Dār 'Ammār, 2010) 19-20.

[14] Imber, *supra* note 1, 143-146; J.E. Mandaville, "Usurious Piety: The Cash *Waqf* Controversy in the Ottoman Empire", *International Journal of Middle East Studies* 10 (1979) 289.

[15] Aḥmad Ibn 'Umar al-Khaṣṣāf, *Kitāb Aḥkām al-Awqāf* (Maktabat al-Thaqāfa al-Dīniyya, 1904); Hilāl al-Rā'ī, *Kitāb Aḥkām al-Waqf* (Maṭba'at Majlis Dā'irat al-Ma'ārif al-'Uthmāniyya, 1937). Legal technique of *waqf* was used by 'Umar Ibn Khaṭṭāb to build land by the state for the benefit of the community. R.G. Forand, "The Status of the Land and Inhabitants of the Sawād during the First Two Centuries of Islam", *Journal of the Economic and Social History of the Orient* 14 (1971) 25.

[16] Pre-Islamic form of divorce, consisting in the words of repudiation: "you are to me like my mother's back". Weir, *supra* note 10.

[17] Ibn Qudāma, *Al-Mughnī* ('Abd Allāh ibn 'Abd al-Muḥsin Turkī and 'Abd al-Fattāḥ Muḥammad Ḥulw (eds.), 15 vols., Dār 'Ālam al-Kutub, 1997) vol. 8, 189. Both *Fatāwā al-'Ālamgīriyya* and commentary of *Hidāya*, *Sharḥ Fatḥ al-Qadīr* discuss various expressions for making a *waqf*. Both state that the custom and practice is to be taken into account in order to determine whether the donor meant creation of a *waqf* or a donation for charity in case certain expressions are used which do not explicitly create a *waqf*. Al-Shaykh Niẓām, *Fatāwā al-'Ālamgīriyya* (4 vols., Nawal Kishore, 1865) vol. 2, 462; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr 'alā al-Hidāya* ['Abd al-Razzāq Ghālib Mahdī (ed.), 10 vols, Dār al-Kutub al-'Ilmiyya, 2003) vol. 6, 188.

Jurists agree that in a *waqf* the substance of property is reserved while its usufruct is spent for specific purposes. However, there is a difference of opinion with respect to the ownership of the reserved property and its usufruct. According to Abū Ḥanīfa and Mālik, the founder continues to own the property and can also revoke the *waqf* at any time. They then differ as to the nature of the founder's interest. According to Abū Ḥanīfa, the *waqf* is the detention of a specific thing in the ownership of the founder while its profit and usufruct is devoted for a charitable purpose. He regards the *waqf* as revocable, analogous to *'ariya*[18] and it becomes irrevocable only by the order of the court or death of the founder.[19] Mālik agrees with Abū Ḥanīfa to the extent that the *waqf* does not signify the extinction of ownership in the substance of property by the founder, however, he holds that the *waqf* extinguishes the founder's right of usufruct for a limited period of time. According to him perpetuity is not a mandatory condition for a valid *waqf*. Thus only the Mālikī School allows a temporary *waqf*.[20]

The majority of jurists, which includes Shāfi'ī, Aḥmad ibn Ḥanbal and two disciples of Abū Ḥanīfa, Abū Yūsuf and Muḥammad al-Shaybānī, hold that a *waqf* signifies the extinction of the ownership of the founder in the dedicated assets, which are detained in the implied ownership of God and their profits are applied for the benefit of mankind.[21] The ownership of the founder extinguishes and the *waqf* property cannot be sold, gifted or inherited by either him or the beneficiaries. Thus the substance of the *waqf* property ceases to be a subject of private property. The beneficiaries are *ipso facto* proprietors of the usufruct of property.[22]

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[18] *'Ariya* is a temporary borrowing for a limited time where the possession of the thing is given for use only while the ownership is retained by the original owner. Al-Qudūrī, *Mukhtaṣar al-Qudūrī* (Shaykh Kāmil Muḥammad Muḥammad 'Uwayḍa (ed.), Dār al-Kutub al-'Ilmiyya, 1997) 153.

[19] Al-Shaykh Niẓām, *supra* note 17, 955; Al-Marghīnānī, *Al-Hidāya* (Muḥammad 'Adnān Darwīsh (ed.), 4 vols., Dār al-Arqam, 1997) vol. 3, 15-16; Al-Zuḥaylī, *supra* note 13, 7599.

[20] Al-Zuḥaylī, *ibid.*, 7602.

[21] Ibn al-Humām, *supra* note 17, 187-191; Al-Shaykh Niẓām, *supra* note 17, 955; Ibn 'Ābidīn, *Radd al-Muḥtār 'alā al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār* ('Ādil Aḥmad 'Abd al-Mawjūd and 'Alī Muḥammad Mu'awwaḍ (eds.), 14 vols., Dār al-Kutub al-'Ilmiyya, 2003) vol. 6, 517; Nawawī, *Minhaj et Talibin. A Manual of Muhammadan Law according to the School of Shafi'i Translated into English from French Edition of L.W.C. Van Den Berg by E.C. Howard* (W. Thacker & Co., 1914) 232.

[22] Nawawī, *supra* note 21, 232-233.

According to all jurists, a *waqf* for a mosque is irrevocable and perpetual as mosques are built for God.[23] Therefore, the land of a mosque cannot be sold in any case, though the building may have fallen into ruins and be impossible to reconstruct.[24] However, if the authorised *mutawallī* (administrator) of a mosque buys property with the money of the *waqf*, according to the commonly accepted view the new property will not become part of *waqf* property but will become the property of the mosque, which can be sold.[25]

The above two definitions of the *waqf* are consistently quoted in classical, post-classical and contemporary literature on *waqf*. The second definition is approved by the majority of Ḥanafī jurists. However, inconsistency is apparent when Muḥammad al-Shaybānī opines that in case the *waqf* property is destroyed or damaged to the extent that it can no longer be used or exploited in the way envisioned by the founder, the remains of the property revert to him or his heirs.[26] The Shāfi'īs and Ḥanbalīs hold that in such cases the property reverts to the close relatives of the founder. Only Abū Yūsuf regards the poor as the ultimate beneficiaries in this case.[27]

From the legal texts on *waqf*, it is clear that the connection of the founder with the property does not cease as is asserted by jurists.[28] The family of the founder is also given preference in the appointment of the *mutawallī* (administrator) by the *qāḍī* who should appoint one from the family of the founder where no one is specified and the post falls vacant.[29] This defect in the definition becomes evident when it comes to

[23] In order to establish an irrevocable *waqf* for a mosque, prayer must be offered by a group of two or more persons and according to one opinion attributed to Abū Ḥanīfa there should be *adhān* (call for prayer) and an undisclosed offering of prayer to make the establishment of the *waqf* public. Al-Shaykh Niẓām, *supra* note 17, 1060. Al-Marghīnānī, *supra* note 19, 21.

[24] Nawawī, *supra* note 21, 253; Al-Zuḥaylī, *supra* note 13, 7673.

[25] Al-Shaykh Niẓām, *supra* note 17, 1063.

[26] *Ibid.*, 1042.

[27] Al-Zuḥaylī, *supra* note 13, 7650-7651.

[28] Shāfi'ī goes to the extent that in case the property is damaged by the founder after the creation of a *waqf*, he is liable for it. Al-Shāfi'ī, *Kitāb al-Umm* (7 vols., Al-Maṭba'a al-Kubrā al-Amīriyya, 1903) vol. 3, 274.

[29] Al-Shaykh Niẓām, *supra* note 17, 999; Ibn 'Ābidīn, *supra* note 21, 637-638. This principle was actually applied in the Islamic courts as late as the 1930s. See Y. Reiter, *Islamic Endowments in Jerusalem under British Mandate* (Frank Cass, 1996) 228-229. For its application by the Privy Council in an Indian case, see *Mahomedally v. Mithoolly* (1953) 56 Bom L R 388 (PC).

the dissolution of *waqf*. The Ḥanafī jurists agree that the *waqf* is dissolved if the male founder apostatises.[30] This shows that the relation between the founder and *waqf* property does not cease by the creation of a *waqf*, as is the case with other transactions such as sale, gift and manumission. However, jurists were cognizant of this anomaly and tried to solve the problem of the ownership of *waqf* property within the Islamic legal paradigm. Thus an opinion is attributed to Shāfi'ī and Aḥmad ibn Ḥanbal according to which the ownership of *waqf* property is transferred to the beneficiaries. This is the accepted view in the Ḥanbalī School.[31] However, the Shāfi'ī School rejects this view.

There are two diverging opinions on this issue and each employs different type of analogy. The first and often quoted view is that the ownership is transferred to God Almighty for the benefit of mankind, as is the case with a mosque. The right of the founder ceases over the *waqf* property, same as the freed slave no longer remains the property of the master. The other view is that no transfer of property takes place, but the property is reserved or sequestrated and the founder does not lose his ownership; rather his right to alienation is curtailed under law. In support of this view, an analogy is made with *Umm al-Walad*, the female slave, who on giving birth to a child of her master can no longer be sold and becomes free at the death of her master.[32] Therefore, it is argued that the *waqf* property is like the *Umm al-Walad*, which is owned by the founder but cannot be alienated by sale, gift or inheritance.[33] This view is supported by the tradition of the Prophet when 'Umar approached him for advice by telling him that he wanted to make best use of his property. The Prophet advised him, "*ḥabis al-aṣl wa sabil al-thamara*" (sequester the substance and donate the usufruct).[34]

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[30] Al-Shaykh Niẓām, *supra* note 17, 918; Ibn al-Humām, *supra* note 17, 187; Ibn 'Ābidīn, *supra* note 21, 604.

[31] Ibn Qudāma, *supra* note 17, 188.

[32] For details, see J. Schacht, "Umm al-Walad", *Encyclopaedia of Islam*, 2nd edn. (2011) http://www.brillonline.nl/subscriber/entry?entry=islam_COM-1290 (accessed 10 May 2011).

[33] Ibn al-Humām, *supra* note 17, 189-190.

[34] This tradition is found in the six compilations of the sayings of the Prophet and is regarded as the authority for the legitimacy of the *waqf* under Islamic law. See Muḥammad Ibn Ismā'īl Bukhārī, *Ṣaḥīḥ al-Bukhārī* (Muḥammad Muḥsin Khān (trans.), *Kitāb al-Waṣāyā, Bāb al-Waqf kayfa Yukatab*, 9 vols., Kazi Publications, 1979) vol. 4, 27; Muslim ibn al-Ḥujjāj al-Qushayrī, *Ṣaḥīḥ Muslim* (Abū al-Muṭī Amīn Qal'ajī (ed.), *Kitāb al-Waṣāya, Bāb al-Waqf*, 8 vols., Dār al-Ghad al-'Arabī, 1988) vol. 5, 408; Abū Dā'ūd Sulaymān ibn al-Ash'ath al-Sijistānī, *Sunan Abī Dā'ūd* ('Izzat 'Ubayd Da'as and 'Ādil Sayyid (eds.), *Kitāb al-Waṣāya*,

In effect, however, the founder retains his ownership of the *waqf* property not only during his lifetime but also after death because the *mutawallī* (administrator) is bound to use the income of the property in accordance with the stipulations of the founder. This view also finds support in the tradition of the Prophet: "Alms (*sadaqa*) are effective until the day of resurrection".[35] As the founder is the absolute owner of his property, his conditions for the objectives of the *waqf* should be strictly followed in perpetuity. There is also a legal maxim, which states: the stipulations of the founder are like the provisions of the law giver (*shurūṭ al-wāqif ka-nuṣūṣ al-shāriʿ*). This maxim seems to be based on the tradition of the Prophet which states that "the clauses stipulated by the Muslims must be observed, unless it is a clause that allows that which is illicit or prohibits that which is licit".[36]

The principle of strict adherence to the stipulations of the founder is also endorsed by the Qur'ānic verse: "If any man changes it after hearing it, the sin will rest upon those who change it; surely, God is All-hearing, All-knowing".[37] This verse is related to the rules of inheritance. It was quoted in various *fatāwā* in order to refuse any change in the stipulations of the founder. Thus in a *fatwā* it is held that if the founder indicated some ways in which the usufruct must be used but does not single out other possible ways, his stipulations must be followed. For example, if the founder endowed the books for 'reading and consulting', they should not be copied.[38]

The above traditions of the Prophet and verses of the Qur'ān appear to be specific to Muslims, whose proprietary rights are protected even after

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Kitāb fī al-Rajul Yaqifu al-Waqf, 5 vols., Dār Ibn Ḥazm, 1997) vol. 3, 200; Muḥammad Ibn Yazīd Ibn Mājah, *Sunan Ibn Mājah* (Muḥammad Fuʾād ʿAbd al-Bāqī (ed.), *Kitāb al-Sadaqāt. Bāb man Waqf*, 2 vols., Dār Ihyā al-Turāth al-ʿArabī, 1975) vol. 2, 901; Ibn Sinān al-Nasāʾī, *Sunan al-Nasāʾī* (Sālih ibn ʿAbd al-ʿAzīz (ed.), *Kitāb al-Aḥbās*, Dār al-Salām, 1999) 507-508; Muḥammad ibn ʿIsā Tirmidhī, *Sunan al-Tirmidhī* (Khalīl ʿAbd al-Ghanī Maḥfūẓ (ed.), *Kitāb al-Aḥkām ʿan al-Rasūl, Bāb fī al-Waqf*, 5 vols., Dār al-Kutub al-ʿIlmiyya, 2003) vol. 3, 659.

[35] Imber, *supra* note 1, 147, citing I. Bazzaz, *Al-Fatawa al-Bazzaziyya, in the margins of Al-Fatawa al-Himaliyya* (Imperial Press, 1912/13) vol. 6, 251.

[36] This Hadīth is mentioned by Bukhārī, Tirmidhī and Abū Dāʾūd and is also quoted in several *Fatāwā* on *waqf* in Ahmad ibn Yahyā al-Wansharīsī, *al-Miʿyār al-Muʿrib* (13 vols., Dr. Muhammad Hajji (ed.), *Wizāra al-Awqāf wa al-Shuʾūn al-Islāmiyya li l-Mamlika al-Maghribiyya*, 1981) vol. 7, 288, 340 and 485.

[37] Al-Baqara: 181.

[38] Ahmad Ibn Yahyā al-Wansharīsī, *Al-Miʿyār*, *supra* note 36, 293.

their death. Whether the same protection was available to the *dhimmi* (non-Muslim citizen) under Islamic law is not clear. Generally, non-Muslim citizens were free to adjudicate their disputes under their respective laws. All schools agree upon the validity of a *waqf* made by or for the non-Muslim citizen. According to the Hanafis and Mālikīs for the validity of a *waqf* by the non-Muslim citizen it should be for a pious purpose (*qurba*) under the non-Muslim's own religion as well as Islam. Thus a *waqf* by a Christian or Jew in favour of a mosque is invalid.[39] The Shāfi'īs and Hanbalis do not require piety of purpose under his own religion and according to them such *waqf* is valid.[40]

2.1. *Conditions for the Validity of the* Waqf

The purpose of a *waqf*, according to all schools of thought is *taqarrub ila Allāh* (pleasure of God) by spending usufruct for *birr and khayr* (charity and pious purposes).[41] The majority of jurists do not allow a *waqf* in favour of the rich only.[42] Therefore, the charitable nature of a *waqf* is at the centre of all other conditions required for the validity of a *waqf*.

Generally, perpetuity, irrevocability, unconditionality and inalienability of *waqf* property are the four fundamental conditions for the validity of a *waqf*. There are some other conditions specific to the various parties involved in the *waqf*, its objects, its subject matter, its administration, the deed of *waqf* and the dissolution of *waqf*. The following section discusses the four fundamental conditions and ancillary matters. Separate sections

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[39] See for a *fatwa* to this effect, A.G. Sanjuan, *Till God Inherits the Earth: Islamic Pious Endowments in al-Andalus (9-15th Centuries)* (Leiden: Brill, 2007) 91.

[40] Al-Zuhaylī, *supra* note 13, 7648-7649. The extent to which the non-Muslims were free to lay down conditions for their *waqf* especially to protect their faith is not clear and a separate study is required to determine the theory and practice to this effect. However, a condition that in case some of the beneficiaries convert to Islam or any other religion they will lose their benefits was upheld. See Al-Shaykh Nizam, *supra* note 17, 957, which quotes the third century jurist Al-Khaṣṣāf as one of the authorities. See also Ibn al-Humām, *supra* note 17, 186-187.

[41] The most common expression for the object of *waqf* used in the classic texts is *qurba*, which literally means 'nearness' and in the context is means 'nearness to God', *i.e.*, seeking pleasure of God. In *Fatāwā al-'Alamgiriyya* and *Sharh Fath al-Qadīr*, however, the expression *'talab al wajh'* is used which has the same meanings of "seeking nearness". Al-Shaykh Nizām, *supra* note 17, 956; Ibn al-Humām, *supra* note 17, 188.

[42] Ibn 'Ābidīn, *supra* note 21, 519-521. However, if the first beneficiaries are rich followed by the poor then it is valid, Al-Shaykh Nizām, *supra* note 17, 968.

are devoted to the discussion of the rest of the conditions followed by this section.

As mentioned earlier, the majority of jurists regard perpetuity as a mandatory condition for the validity of a *waqf*.[43] and only the Mālikī School allows a temporary *waqf*.[44] Abū Yūsuf and Muḥammad regard a *waqf* as irrevocable and perpetual because, according to them, the *waqf* signifies the termination of ownership as in the case of divorce and manumission, which takes effect by mere pronunciation of words and there is no requirement for the acceptance of *waqf* property. Abū Ḥanīfa, however, makes an analogy of *waqf* with *ārīya*, which is revocable at the option of the founder and becomes void with his death except where it is to take effect after the death of the founder and is effective only to the extent of one third of his property unless heirs consent otherwise.[45]

Abū Ḥanīfa, Muḥammad and Shāfiʿī (in one statement attributed to him), require that the *waqf* must provide for a purpose, which is perpetual as perpetuity is a condition for the validity of the *waqf*. Any *waqf* that does not provide such an object (*ghayr muʾabbad*) is invalid.[46] Abū Yūsuf, Mālik and Shāfiʿī, however, do not regard this as a mandatory condition and a *waqf* is for the poor after the extinction of its original object.[47] Abū Yūsuf's argument is that such a condition is not laid down by the Companions of the Prophet and it exists in the *waqf* by implication as the intention of the founder is to benefit the poor though they might not have specifically stipulated it.[48] Ḥanbalīs and Shāfiʿīs do not require such a condition and where the object of a *waqf* is limited, it reverts to the poor family members of the founder after the extinction of the beneficiaries.[49] The Ḥanbalī and most Shāfiʿī jurists base their view on the implicit notion of charity in the *waqf* and further strengthen their view by referring to several traditions of

[43] The condition that limits the *waqf* to a specified time period is invalid. Al-Sharkh Nizām, *supra* note 7, 959. However, a saying is ascribed to Abū Yūsuf that he regarded a time limited *waqf* as valid. Ibn Qudāma, *supra* note 17, 92; Ibn Ābidīn, *supra* note 2, 542.

[44] Hoffening points out that according to the Mālikīs the *waqf* can be revoked by the founder or his legal heirs. Hoffening, "Wakf", *supra* note 5, 1097.

[45] Al-Zuḥaylī, *supra* note 13, 7604-7605.

[46] Aḥmad Ibn ʿUmar al-Khaṣṣāf, *supra* note 5, 32.

[47] According to the Ḥanafīs, a *waqf* can have three dimensions: solely for the poor; initially for the rich and then for the poor; and for the poor and rich equally such as public places like mosques, graveyards, inns, etc. Ibn Ābidīn, *supra* note 21, 601.

[48] Al-Shaykh Nizām, *supra* note 7, 960.

[49] Ibn Qudāma, *supra* note 7, 210-213.

the Prophet which state that the best charity is the charity in favour of one's relatives.[50]

The conditions of perpetuity and irrevocability are implied by jurists from the sayings of the Prophet and the traditions of his Companions. The tradition of 'Umar, which is widely quoted as an authority for the validity of the *waqf*, does not require it to be irrevocable. However, it does mention that the property made *waqf* must not be sold, gifted or inherited. Other traditions about *sadaqa* (charity) mention that once given it should not be taken back.[51] These *sadaqa* traditions are mentioned in *Al-Muwaṭṭaʾ* of Imam Mālik who regards a *waqf* as revocable. Does this mean that there is a distinction between the *waqf* and the *sadaqa*? Is not the *waqf* a form of *sadaqa* and the terminologies of *sadaqa muḥbisa*, *sadaqa muḥarrama*, *sadaqa jāriya* and *fī sabīl lillāh* convey the same meaning?

The answer to the above questions is provided in *Al-Mudawwana al-Kubrā*. It is stated that Ali ibn Ṭālib said that *ḥibs* is of three types: one for God, the other for people and the third for *thawāb* (reward for good deeds in the hereafter).[52] The third category is revocable. A similar saying is attributed to 'Umar ibn Khaṭṭāb who is reported to have said that whoever made a gift for kinship or *sadaqa* it is not revocable and whoever made a gift for *thawāb*, it is revocable.[53] These sayings seem to differentiate between a gift/donation for *thawāb*, for God and for *sadaqa*, although in essence they are one and the same thing. The purpose of *thawāb* is seeking the blessings of God as is the case with *sadaqa*. However, in the sayings of Ali and 'Umar, the *ḥibs* for God and *ḥabs* for *thawāb* are distinguished. In the latter case, the donor can revoke it if he wants to do so. Imām Mālik and the Mālikī jurists seem to make a delicate distinction between the two where one is revocable and the other is not. The *waqf*/*ḥabs* falls under the category of revocable.[54]

As the *waqf* is made for a pious charitable purpose, it must also be unconditional.[55] The founder is not allowed to attach any condition, which

[50] Al-Zuḥaylī, *supra* note 13, 7650–7652.

[51] Imam Malik ibn Anas, *Muwaṭṭaʾ*, ʿAbd al-Majīd Turkī (ed.), (Dār al-Gharb al-Islāmī, 1994) 537–538.

[52] Wehr, *supra* note 10.

Saḥnūn ibn Saʿīd, *Al-Mudawwana al-Kubrā*, (Aḥmad ʿAbd al-Salām (ed.), 5 vols., Dār al-Kutub al-ʿIlmiyya, 1994) vol. 4, 425–426.

[53] However, in practice Mālik jurists regarded the *waqf* as perpetual. See Sanhuri, *supra* note 39, 82–84.

[54] Nawawī, *supra* note 27, 23; Al-Shaykh Niẓām, *supra* note 17, 959.

may hinder the immediate creation of a *waqf*. Neither can he reserve the right to sell the *waqf* property in hard times for his own needs.[56] The majority of jurists regard a conditional *waqf* as void because it is an irrevocable contract that requires transfer of ownership immediately and is not valid conditionally like a sale and gift. Therefore, for the validity of a *waqf* it must not be conditional (*min allaq*) or dependent at a future point of time (*muqāf ilā waqt fī l-mustaqbal*). The Mālikīs, however, do not impose this condition. The only exception in this principle is the condition of death and a testamentary *waqf* is valid which takes effect to the extent of one-third of the founder's property without the permission of heirs. However, if heirs allow, the *waqf* exceeding one-third property of the founder is valid. If only some of them allow such excess, the *waqf* includes the properties proportionate to their permission.[57]

A *waqf* does not become binding (*lāzim*) and irrevocable until the property is transferred to a *mutawallī* (administrator) or beneficiaries. The *waqf* becomes void if before the transfer of *waqf* property the founder dies or loses his right of disposal over the property as a result of bankruptcy or death illness (*marad al-mawt*). This view is held by the Mālikīs, Ḥanafīs (except Abū Yūsuf), Shī'a Imāmiyya and some Ḥanbalīs. The Mālikīs are the strictest in this regard as *hawz* (dispossession by the founder) is a fundamental condition of the *waqf* according to them.[58] A corollary of this condition is that the founder cannot be the *mutawallī* (administrator) of the *waqf*.[59] The basis of their argument is that a *waqf* is like a gift that requires transfer of possession for its validity. Those who do not require transfer of property (Abū Yūsuf and Shāfi'ī) argue that the tradition of

[56] Ibn Abidīn, *supra* note 21, 524–525.

[57] Abū Yūsuf allows a three days option for the revocation of a *waqf*. However, he agrees with other jurists as to the option regarding a *waqf* for a mosque, which becomes effective immediately and the condition of option becomes void. Al-Shaykh Nizām, *supra* note 7, 950.

[58] *Ibid.*, 1027.

[59] Sahnūn ibn Sa'īd, *supra* note 53, 4, 419–420.

[60] This restriction is said to have limited the incentive to set up *madāris* (schools, pl. of *madrasa*) by the Mālikī school and caused to demur in the Eastern part of Muslim world. Makdisi, *supra* note 3, 37–38 and 238; G. Makdisi, "On the Origin and Development of the College in Islam and the West" in: K.I. Semaan (ed.), *Islam and the Medieval West: Aspects of Intercultural Relations* (State university of New York Press, 1980) 37; G. Makdisi, "The Madrasa in Spain: Some Remarks", *Revue de l'Occident musulman et de la Méditerranée* 15 (1973), 53, 55–156.

Umar does not mention it as a condition and that founding a *waqf* is like freeing a slave (*al-'itq*) – an act which does not require transfer.[61]

The majority of jurists regard acceptance as a condition for the validity of the *waqf* in case the *waqf* is made in favour of some specified persons.[62] The Hanafis and Hanbalis, however, do not regard acceptance as necessary.[63] The *waqf* is not affected by the refusal of the specified persons and automatically transfers to the next person(s) in case of such refusal. If no beneficiary is found it is to be spent on the poor, as the purpose of the *waqf* is perpetuity. The poor relatives of the founder are given preference. Another view is that in this case the property reverts to the founder or his heirs[64] if they are found otherwise it goes to the state treasury as an ownerless property.[65]

After complying with the above conditions, the founder is granted considerable latitude in setting up the conditions for the objectives and operations of the *waqf*. He sets out the mechanism for the administration of the *waqf* and the distribution of its income. The most important feature of the founder's powers is that he is not bound by the strict rules of the Islamic law of inheritance while setting up a *waqf*. Thus he can specify any of his children as the beneficiaries to the exclusion of others. Likewise, he can specify any object of a *waqf*, which is not sinful, in favour of general public. He can be the first *mutawalli* (administrator) himself and provide a mechanism for the subsequent appointment and removal of the *mutawalli*.[66] He can also reserve power to distribute the usufruct of the *waqf* property to whomever he wants during his lifetime along with the power to add or exclude beneficiaries.[67] He could also retain his right to modify the terms and conditions of the *waqf*, which are to be strictly followed. As the *waqf* was perpetual, the founder usually provided the constitution of the *waqf* which was to last forever.

[61] Al-Zuhayli, *supra* note 13, 7608–7619; A. Meier, "Wakf", *Encyclopaedia of Islam*, 2nd edn. (2011), http://www.brillonline.nl/subscriber/entry?entry=islam_COM-1466 (accessed 10 May 20

[62] Nawawi, *supra* note 21, 323.

[63] Ibn Qudāma, *supra* note 17, 188.

[64] Sabiq, Ibn Sa'id, *supra* note 53, 422.

[65] Ibn Qudāma, *supra* note 17, 2

[66] However, a *mutawalli* appointed by a *qadi* cannot be removed by the founder. Al-Shaykh Nizam, *supra* note 17, 997.

[67] However, once given the founder cannot take back the property. *Ibid.*, 992.

However, a *waqf* for one's own benefit is invalid according to the majority of jurists (Mālik, Shāfiʿī and Muḥammad), because one cannot owe from oneself like buying something from one's own set.[64] But Abū Yūsuf and Aḥmad ibn Ḥanbal[65] regard such a *waqf* as valid and Abū Yūsuf's opinion is the accepted view in the Ḥanafī School.[66] The majority of jurists allow a *waqf* of a jointly owned property by one co-owner.[67]

2.2 Waqf *Property and its Use*

The Ḥanafīs require that the subject matter of a *waqf* should be immovable property[68] in the absolute ownership of the founder[69] and must also be specified at the time of the creation of the *waqf*.[70] The Ḥanbalīs and Shāfiʿīs view is that everything that can be used without extinguishing its substance can be the subject matter of a *waqf*.[71]

The *waqf* property should be revenue generating and as a general rule the *waqf* of mere usufruct of the property without the substance is invalid.[72] Similarly, the *waqf* of a building without the land is invalid.[73] The *waqf* of easement rights is invalid according to the Ḥanafīs.[74] The *waqf* of *iqṭāʿ* (concession/grant for tax collection) is also not valid, as the state reserves the ownership of such land. As this type of land is not absolutely owned by

[64] Ibn Qudāma, *supra* note 7, 194.

Ibid., 197.

[66] The reason for giving preference to Abū Yūsuf's view is to encourage people to create *waqf* for charitable purposes. Ibn Ābidīn, *supra* note 21, 583; Al-Shaykh Niẓām, *supra* note 17, 959 and 989; Al-Qudūrī, *Mukhtaṣar al-Qudūrī*, *supra* note 18, 28.

[67] Al-Shaykh Niẓām, *Ibid.*, 965.

Ibid., 962. According to Abū Ḥanīfa, the *waqf* of military horses and weapons is not permissible because they are movable and it is not customary to make them subject to a *waqf*. His two disciples, Abū Yūsuf and Muḥammad, however, regard such a *waqf* as valid relying upon the saying of the Prophet: "Khālid made a *waqf* (*iḥtabasa*) of his horses in the way of God" (*fī sabīl Allāh*). Al-Marghīnānī, *supra* note 9, 17. *Waqf* of the Qurʾān and books is valid according to the Ḥanafīs. Al-Shaykh Niẓām, *supra* note 7, 963.

[68] Al-Zuḥaylī, *supra* note 13, 7635. The rationale for the requirement of absolute ownership is that the *waqf*, according to the Ḥanafīs, signifies the cessation of the ownership of the founder. Therefore, the property must be absolutely owned to make a *waqf*. Thus in cases where the ownership right of the founder is not perfect, e.g. an incomplete sale transaction, the *waqf* is not valid. Al-Shaykh Niẓām, *Ibid.*, 957–958.

[69] *Ibid.*, 956.

[70] Ibn Qudāma, *supra* note 7, 229–230; Ibn al-Humām, *supra* note 17, 203.

[71] Al-Zuḥaylī, *supra* note 13, 7637.

[72] Al-Shaykh Niẓām, *supra* note 17, 963.

[73] Al-Zuḥaylī, *supra* note 13, 7613.

a private person, not even the ruler himself, the *waqf* made of this land is regarded as invalid.[79] One exception to this general rule was the *waqf irṣād*, made by rulers out of state properties.[80]

The Ḥanafī and Ḥanbalī jurists unanimously held that the *waqf* of a subject matter which could only benefit by its consumption, e.g., food, drinks and silver and gold currency, is not valid because the *waqf* is made for eternity and this condition cannot be fulfilled with consumable property.[81] However, in certain parts of the Ottoman Empire, the practice of cash *awqāf* flourished and perpetuity was attained by investing the cash in *muḍāraba* partnership (*commenda*). The profits were used as the usufruct of real estate. The validity of this practice was hotly debated amongst jurists. Abū Suʿūd, the Shaykh ul-Islam of Sulaymān the Magnificent, issued a *fatwā* in favour of such *awqāf* despite the fact that they involved payment of interest as practically the *waqf* money was not invested in *muḍāraba* (commenda) but it was lent on interest. Abu Suʿud did not come up with an entirely unique justification. In the Ḥanafī legal tradition, the third famous disciple of Abū Ḥanīfa, Zufar regards the cash *waqf* as valid and the other disciple Muhammad al-Shaybani, also permits the *waqf* of movables if that is sanctioned by custom.[82]

[79] This was the case in the Ottoman Empire. In Mughal India, however, the royal grants of property were made to shrines as a *waqf*. G.C. Kozlowski, "Imperial Authority, Benefactions and Endowments (*Awqāf*) in Mughal India" (1995) 38 *Journal of the Economic and Social History of the Orient* 355. See also *Kulb Ali Hossein v. Syf Ali* 2 Sel. Rep. 110 (O); 139 (N) and 3 Sel. Rep. 407 (O); 543 (N).

[80] Under the Ḥanafī School, the *waqf irṣād* is regarded as "not a real *waqf*", but it is not invalid despite the fact that it does not fulfil the condition of the absolute ownership of the founder because the sulṭān or ruler does not own state land. However, unlike the real *waqf*, two restrictions were imposed on it. First, its objectives were limited to the subjects, which could be supported by the treasury (*bayt al-māl*). Second, the stipulations of the founder were not binding on the succeeding rulers, though they could not abolish it or divert its funds from the stated objectives. Ibn ʿĀbidīn, *supra* note 21, 654; K.M. Cuno, "Ideology and Juridical Discourse in Ottoman Egypt: The uses of the concept of *irṣād*" (1999) 6 *Islamic Law and Society* 136, 143–144.

[81] According to the Ḥanbalīs and Shāfiʿīs, the *waqf* of jewellery, however, is allowed and no *Zakat* is payable on it. Ibn Qudāma, *supra* note 17, 229–230; Al-Shaykh Niẓām, *supra* note 17, 362.

[82] Al-Shaykh Niẓām, *supra* note 17, 365; Ibn ʿĀbidīn, *supra* note 21, 555–556. Interestingly, in the eighteenth century the Ḥanafī judges did not find it difficult to validate the *waqf* of securities and shares. Ali, *Mohammedan Law*, *supra* note 1, 246; Dr. A. Al-Maʾmūn Suhrawardy, "The *Waqf* of Movables" (1911) 7 n.s. *Journal of the Asiatic Society of Bengal* 323.

The *waqf* for public services like schools, hospitals, orphanages, soup kitchens, waterways, bridges, public roads, mosques etc., consists of two types of properties. One is for the utility itself and the other generates revenue for its maintenance and operation. The second type included rent generating houses, shops and agricultural lands. In some cases whole markets and many villages were owned by *waqf*.[83]

When the *waqf* properties become useless due to change in circumstances they are to be used for the similar objectives. For example, if a *khān* (lodge for travellers) in a village becomes useless, it is to be used for another *khān* in the village.[84] As the *waqf* is a perpetual charity, the *waqf* property cannot be sold or consumed. However, serious challenge was posed when the *waqf* properties were seriously damaged or destroyed or they became useless due to the change of circumstances. In order to deal with such situation, the *waqf* property could be exchanged for a similar property (*istibdāl*) or money, which essentially means sale or it could be given on a long-term lease called *ḥikr* or *ijāratayn*.[85] The Ḥanafīs regard *istibdāl* and the sale of *waqf* property as valid where it is stipulated by the founder for himself or for the future *mutawallī*.[86] They still allow it where it is not thus stipulated or even prohibited by the founder but the *waqf*

[83] For examples of such *awqāf*, see O. Peri, "The *Waqf* as an Instrument to Increase and Consolidate Political Power: The Case of Khasseki Sultan *Waqf* in late Eighteenth-Century Ottoman Jerusalem" in G.R. Warburg and G.G. Gilbar (eds.), *Studies in Islamic Society: Contributions in Memory of Gabriel Baer* (Haifa: Haifa University Press, 1984); and M. Hoexter, *Endowments, Rulers and Community* (Leiden: Brill, 1998).

[84] Al-Shaykh Nizam, *supra* note 17, 1042.

[85] *Ḥikr* is a contract for the lease of land for building or cultivation. It is similar to Ottoman practice of *ijāratayn*. Literally *ijāratayn* means two rents. This class of *waqf* developed around 1190 AD as a result of the damage or destruction of a *waqf* building, which could not be repaired due to the lack of funds. The primary purpose of this arrangement was to utilize the damaged or destroyed *waqf* properties by lending them to the tenants who were willing to pay an upfront amount with the condition to occupy the property for their lives. Later on the right to usufruct of this property was extended to the children of the first occupier. However, the transfer was not automatic. It required the approval of the *waqf* administration as well as the government. Succession, sale and mortgage duties were imposed on such *waqf* properties. Ibn Abidin, *supra* note 21, 592; C.R. Tyser, F. Ongley and M. Inzer, *The Laws Relating to Immoveable Property made Waqf* (Nicosia: Government Printing Office Nicosia, 1904) 15-22, 63; J.R. Barnes, *An Introduction to Religious Foundations in the Ottoman Empire* (Leiden: Brill, 1986) 54-55.

[86] In cases where the founder allows *istibdāl* to the *mutawallī* in a *waqf* deed and does not reserve this power for himself, he is still authorized to exchange. Al-Shaykh Nizam, *supra* note 17, 997.

property becomes entirely useless. The *istibdāl* or sale of a mosque is not valid, which is to remain as such until the day of judgment. Muhammad al-Shaybānī's view is that if the *waqf* property becomes useless it reverts to the founder or to his heirs.[88] The Mālikīs do not allow the sale of the immovable property of the *waqf* except for widening the mosque or the street. The Ḥanbalīs are the most permissive in this respect. They allow sale or *istibdāl* if the property is damaged or destroyed to an extent that it is no longer useful. The Shāfi'īs and the Shī'a Imāmiyya hold that the *waqf* remains in existence as long as there are goods left that can be used or exploited in some way. The beneficiaries own the property if the remaining property can only be used by consuming it. However, all schools agree that the sale of *waqf* property is prohibited and the *waqf* property cannot be sold or exchanged only to make its use more profitable.[89]

2.3. *The Administration of Waqf*

As mentioned above, perpetuity is one of the fundamental conditions for the validity of the *waqf*. Islamic law, however, did not have the concept of juristic personality for non-human entities. Therefore, the legal status of the *waqf* posed an intricate juridical problem. Some scholars have suggested that the *waqf* has a financial *dhimma*[90] (capacity) as the *mutawallī* does not own *waqf* property, he does not incur any personal liability while administering the *waqf*, though he can borrow for the maintenance of *waqf* properties with the permission of the court.[91]

[88] Ibn 'Ābidīn, *supra* note 21, 573; Al-Shaykh Niẓām, *ibid.*, 968.

[89] Az-Zuhaylī, *supra* note 13, 7672-7682; Meier, *supra* note 61.

[90] The concept of *dhimma* is the Islamic equivalent of legal personality. Generally, *dhimma* means a presumed or imaginary repository that contains all the rights and obligations relating to a person. The concept of *dhimma* developed in conjunction with the concept of legal capacity (*ahliyya*). The legal capacity (*ahliyya*) consists of two concepts: the capacity to have rights and incur liabilities (*ahliyyat al-wujūb*) and the capacity to conduct or execute one's affairs (*ahliyyat al-adā'*). Some modern scholars suggest that non-human legal persons may have the capacity to enjoy rights and incur liabilities but they cannot have the capacity to fulfil their obligations on their own. However, this can be true with respect to religious obligations only. As the concepts of legal capacity and personality embrace both religious and financial rights and liabilities, non-human entities are capable of financial rights and liable for the same. Muṣṭafā Aḥmad Zarqā, *Al-Madkhal al-Fiqhī al-'Āmm* (2 vols., 6th edn., Maṭba'at Jāmi'at Dimashq, 1959) vol. 2, 733-74.

[91] Al-Shaykh Niẓām, *supra* note 17, 1008; Ibn 'Ābidīn, *supra* note 21, 657-658.

The problem of perpetuity is resolved through the legal fiction under which the *waqf* property is vested in God. Jurists identified the separation of the substance and usufruct in *waqf* property. Whereas the substance is reserved (either in the ownership of the founder or God), the usufruct belongs to the beneficiaries. This is the unanimous view of all jurists.[91] The entire class of beneficiaries is, however, not identifiable as the *waqf* is perpetual and every beneficiary has only a lifetime interest in the usufruct of *waqf* property. However, in a family *waqf*, the entire class of beneficiaries is identifiable at one point in time, though the future beneficiaries remain unidentified. Moreover, even in this type of *waqf* according to the accepted view of Hanafis, ultimate beneficiaries are the poor who are not identifiable. This gives rise to a complex question about the nature of the *waqf*: whether it is a private or a public arrangement? If it is private, then the state cannot interfere in its administration. Some *awqaf* are a mixture of private and public interests. Since according to the commonly accepted view, the poor are the ultimate beneficiaries even in a family *waqf*, theoretically state interference is justified in all types of *awqaf*.

The external control of the *waqf* was primarily vested in the *qāḍī*. Therefore, the duties of the *qāḍī* in this respect are discussed in the *Fiqh* literature. As the primary object of a *waqf* is charity, which involves public welfare, the community represented by state has a stake in it. That is how a *qāḍī* (court) assumes the responsibility of supervision of a *waqf*.[92] Theoretical justification for the interference of the state through the *qāḍī* into the affairs of *waqf* also stems from the conceptual ownership of *waqf*

[91] According to Aḥmad ibn Hanbal and some Shafi'is the ownership of *waqf* property is vested in the beneficiaries. Some scholars have attributed to Aḥmad the saying that the beneficiaries are not owners, as the *waqf* property is neither to be sold nor inherited. Ibn Qudāma, *supra* note 27, 188.

[92] In the history of *waqf*, when the *qāḍī* was assigned this duty is not known. However in the *waqf* of the Companions, *qāḍī* finds no mention. Likewise, the *qāḍī* is not mentioned in the two earliest Hanafi treatises of the third Islamic century written by al-Khaṣṣāf and Hilal al-Ra'y. The *waqf* deed found in *Kitāb al-Umm*, however, assigns the *qāḍī* a duty to appoint an administrator in case "among the existing generation there is no one who is capable and trustworthy". Al-Shāfi'ī, *supra* note 28, 283. According to the information provided by Al-Kindi (d. 350/961), we find that the management of the *waqf* was assigned to a specialized department (*dīwān*) under the rule of Umayyad Caliph Hisham ibn Abd al-Malik (reigned 724–743 AD) at the behest of the Judge Tawba ibn Namir al-Hadrami in H. 118/737. Muhammad ibn Yusuf Kindi, *The Governors and Judges of Egypt, or, Kitab el Umara' (el-wulāh) wa Kitab el-Qudah of El-Kindi* (Brill 1912) 346.

property by God in favour of mankind.[93] The *qāḍī* is a supervisor for the overall management of the *waqf*. He is authorized to interfere in its management where there is a danger to *waqf* property either from the negligent *mutawallī* or the founder himself when he is also a *mutawallī*.[94] The *qāḍī* is to oversee that the valid conditions of a deed of *waqf* are properly enforced and where a deviation is required in order to make effective use of *waqf* properties permission of the *qāḍī* is mandatory. For example, where a stipulation is made that the *waqf* property should not be rented for more than one year[95] and it is beneficial to enter into a long-term lease.[96] In this case the *mutawallī* is required to apply for the permission of the *qāḍī* before entering into a lease extending one year.[97]

In addition to *qāḍī* courts, *maẓālim* courts and special departments for overseeing the *awqāf* existed throughout the Muslim world since the second century of Islam (eighth century AD). The powers and duties of such courts and departments varied from time to time and place to place. The historical evidence about their existence and operations is not found in legal compendia as they fell under the *siyāsa* jurisdiction of rulers. Rulers under this jurisdiction were allowed to deviate from the strict injunctions of Islamic law for protecting the general interests of community through effective governance and administration of state. Therefore, the head of *maẓālim* courts could recourse to supra legal measures in order to ensure that public *awqāf* (*al-awqāf al-ʿammah*) were properly managed in accordance with the stipulations of the founder. Thus he could initiate an investigation into the affairs of the *waqf* without a formal complaint being filed by the eligible person and could also rely upon official documents without the witnesses. However, with respect to the private *awqāf* (*al-awqāf*

For a detailed discussion see M. Hooker, 'Hujjaj Allah and Haqaq Allah as Reflected in the *Waqf* Institution' *Jerusalem Studies in Arabic and Islam* 9 (1987) 133.

[94] Al-Sharkh Nizām, *supra* note 17, 997.

[95] Such conditions were normally laid down in the *waqf* deeds in order to avoid expropriation of *waqf* properties by lessees.

[96] Al-Zuḥaylī, *supra* note 13, 7688.

[97] Al-Kindī records that the *qāḍī* diligently ensured that the *waqf* properties were properly maintained and some of them personally supervised the maintenance. In case the administrator was found negligent in maintaining the property, he was punished with lashes. Muḥammad ibn Yūsuf Kindī, *The Governors and Judges of Egypt*, *supra* note 92, 394-395 and 464.

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al-khāṣṣa), he was bound to follow the proper procedure of law as was applicable in a *qāḍī* court.[97]

The internal administration of the *waqf* is simple. The founder lays down a procedure for the appointment of one or more than one *mutawallī* to administer the *waqf* according to the terms and conditions of the *waqf* deed.[98] He could do this either by specifying the names like A, B and C, or conditions like the wisest, eldest or most knowledgeable person amongst the family or community. However, if the founder did not appoint a *mutawallī* the *qāḍī* is to appoint one according to the Mālikis and Shāfi'is.[99] The Hanafi view is that the founder is the *mutawallī*[100] whether he made this a condition or not and after his death the appointment would be according to the will, if such a will is made and where it is not made, the ruler is to appoint a *mutawallī*. The Hanbalis agree with the Hanafis that the ruler will appoint a *mutawallī* in case the beneficiaries are unspecified like the poor or *'ulamā'* or *mujāhidīn* (warriors) or *madrasa* (school) or mosque. However, if the beneficiaries are specified then every beneficiary is *mutawallī* to the extent of his shares as Hanbalis regard the beneficiaries to be the owners of *waqf* properties.[101]

The *mutawallī* must be a capable person with necessary skills to manage the *waqf*. He should be a trustworthy (*amīn*) and just (*'adil*) person and must not be a *fāsiq* (sinful).[102] The condition of capability requires that the *mutawallī* be a major, however, if a minor is nominated as a *mutawallī* he will assume that position upon attaining the age of majority.[103] Mature mind and Islam is not a condition as a woman and non-Muslim can also be a *mutawallī*.[104] The *mutawallī* should not put himself into a position of conflict of interests and where he buys from the *waqf* property or mortgages

[97] Al-Mawardi, *Al-Ahkam as-Sultaniyyah (The Laws of Islamic Governance)* (Asadullah al-Ghalibi Yate trans., Ta-Ha Publishers Ltd. 1996) 24–25.

[98] Another expression used for the mutawalli is *qayyim*. This is the simplest form of a *waqf*. In other cases a *nāẓir* (accountant) might be appointed by either the founder or the *qāḍī* to keep an eye on the accounts of the *waqf*. Ibn Abidin, *supra* note 21, 683.

[99] Nawawi, *supra* note 21, 233.

[100] This is the view of Abū Yūsuf. According to Muhammad al-Shaybani, however, the *waqf* is invalid in this case. The reason for this difference is that the former does not require transfer of property as the necessary requirement for the validity of the *waqf* as against the latter who requires it. Al-Shaykh Nizām, *supra* note 17, 936.

[101] Ibn Qodama, *supra* note 17, 237.

[102] Al-Shaykh Nizām, *supra* note 17, 936.

[103] *Ibid.*, 936.

[104] *Ibid.*

it for personal interests, he is to be removed from office.[106] The ruler can remove the *mutawalli* through the court, though he be the founder, in case he is found wanting in any of these requirements.[107] The *mutawalli* is personally liable for an inappropriate conduct, for example where he pays more than normal wages out of *waqf* funds.[108]

The first and foremost duty of the *mutawalli* is to maintain and exploit *waqf* property according to the stipulations of the *waqf* deed. The valid conditions of the founder have the force of law, as there is a maxim "the stipulations of the founder are like the provisions of the law giver" *shurūṭ al-wāqif ka-nass al-shāri'*. The *mutawalli* is like the guardian of a minor or an insane person and owes utmost duty of care and loyalty to the founder and beneficiaries. However, he is entitled to take remuneration for his services.[109]

Since a *waqf* is founded in perpetuity, the *waqf* property is to be maintained in a proper condition and the *mutawalli* is to repair it whether he is authorised by the founder or not. The maintenance expenses are to be incurred before making any payment to the beneficiaries. If the property is exploited by renting it out, maintenance must be paid from the proceeds. If the beneficiaries of a *waqf* have the right to use only, they themselves are liable for the maintenance of the property and where they are unable to do so or neglect the property, the ruler or *qāḍī* can evict them and rent out the property in order to generate money for its maintenance.[110] However, those who have the right of residence cannot give it on rent, as their right is limited to the residence only and they are not the owners of the property.[111]

2.4. *The Deed of* Waqf

The deed of *waqf* is the constitution of a *waqf* and is equivalent to the Memorandum and Articles of Association of a corporation. It contains detailed provisions for the objectives of the *waqf*, the *waqf* property, the

[106] *Ibid.* 1000. The *mutawalli* cannot lease *waqf* property to his son or father except on more than the normal rate, at 1005.

[107] In case there are more than one *mutawalli* of a *waqf*, they are jointly liable and in case some of them embezzle all of them will be removed from their offices. This was the opinion of Abū Su'ūd, the great Shaykh al-Islām of the Ottoman Empire during the sixteenth century; Ibn Ābidīn, *supra* note 2, 4:78.

[108] Al-Shaykh Nizām, *supra* note 17, 10:34.

[109] Al-Zuḥaylī, *supra* note 13, 7689.

[110] *Ibid.* 7670.

[111] Ibn al-Humām, *supra* note 17, 208.

beneficiaries and their shares, the *mutawalli*, their powers and the mechanism for the appointment of subsequent *mutawalli*, and the ultimate object (which should be perpetual according to Muhammad al-Shaybani). However, Islamic law does not recognise the independent evidentiary value of written documents. The document under Islamic law should be endorsed by two witnesses for its validity.[112] This lack of legal potency of the document under Islamic law is said to have been an impediment to the development of institutions in Muslim societies.[113] A strict adherence to this principle should have caused a premature death of the institution of *waqf*. However, this was not the case and a mechanism was developed for the registration of *waqf* deeds with courts. Court records provided evidence in case where no witnesses survived and the dispute was brought before the court for adjudication.[114] However, a *waqf* deed signed by the *qadi* and witnesses is not accepted as evidence and similarly a placard on the door of a house stating it a *waqf* is not a valid piece of evidence without witnesses.[115]

The stipulations of a *waqf* deed are divided into three categories: *sahih* (valid), *batil* (void) and *fasid* (voidable). The valid conditions are to be enforced strictly.[116] However, jurists discuss the circumstances where the valid conditions may not be acted upon, *e.g.*, where the founder stipulated that the property should not be exchanged and the exchange is beneficial. The void conditions are contradictory to the very objective of the *waqf* and they render the *waqf* invalid, *e.g.*, condition for the sale of *waqf* property for the benefit of the founder or for disposing of it as a gift or charity. The

[112] This is paradoxical as the Quran specifically instructs believers to write down every important business transaction. However, the justification of jurists for not relying on documents was the possibility of forgery. But there were many exceptions to this general principle such as the ledgers of moneychangers, brokers and merchants. Ibn Abidin, *supra* note 21, 622. For detailed expression of this principle, see J.A. Wakin, *The Function of Documents in Islamic Law* (Albany, NY: State University of New York Press, 1972).

[113] See G. Leydon, "A Paper Economy of Faith without Faith in Paper: A Reflection on Islamic Institutional History", *Journal of Economic Behavior & Organization* [illegible] (2005) 647.

[114] Al-Shaykh Nizam, *supra* note 17, 1018–1019; Ibn Abidin, *supra* note 21, 599–600.

It seems that apart from registering *waqf* deeds with the *qadi*, important conditions of the *waqf* were also inscribed on the *waqf* property in order to publicise its being a *waqf*. See M. Sharon, "A *waqf* Inscription from Ramlah", (1966) 13 *Arabica* 77. For this practice in India, see *Kulsum Bibee v. Golam Hussein Cassim Ariff* 10 ([illegible]) CWN 449.

[116] The valid conditions mentioned in *Minhaj* which "should be faithfully executed" include that the property should not be leased or the mosque should be for a particular sect only like Shafi'is. Nawawi, *supra* note 21, 235. Similar conditions are mentioned in the *Fatawa al-Alamgiriyya*, *supra* note 7, 955.

voidable conditions are against the beneficial exploitation of *waqf* properties or they are prohibited by *Shari'a*, *e.g.*, revocability of a *waqf* for a mosque or non-removal of the *mutawalli* even though he embezzles, or making of a *waqf* for evil purposes.[117] In this case, the *waqf* is valid and the condition is void.

As the deed of *waqf* was the constitution of the *waqf*, the words used in it were immensely important in order to determine the intention of the founder. Therefore, separate chapters on the interpretations of words and phrases used in the *waqf* deeds are found in *Fiqh* books. The most common words that required interpretation were the words, which established the *waqf*, *e.g.*, *sadaqa*, *muwaqifa*, *muharrama*, etc. One consistently occurring issue has been whether grandchildren were included if the founder used the expression *awlad*'. Jurists usually had recourse to the Qur'an and the traditions of the Prophet to provide answers to such queries.[118]

2.5 *Dispute Resolution under Waqf Law*

The adjudication of the legal disputes relating to *waqf* law involves one complex question: given the difference of opinion between not only various schools but also within one school, which makes adjudication very hard if not impossible, did Islamic law have any practical value? In other words, whether the treatises discussed here so far were merely theoretical and intellectual exercises of jurists with no practical application at all? Even if some relation between the law and practice is established, the question arises about the extent of this relation in different periods of time and jurisdictions. A satisfactory answer to such question could be found by looking into the court records and official archives of various jurisdictions. Various studies by using court cases and official records have already been undertaken in different parts of the world, which establish that the Islamic law of *waqf* was applied in courts before and after colonization.[119]

Al-Zuhayli, *supra* note 5, 7630 and 7660-766.

[118] Ibn Qudama, for instance, quotes the Qur'anic verses of Sura al-Nisa' to argue that singular *walad* (child) includes grandchildren and all the following generations. He further strengthens his argument by the tradition of the Prophet, which mentions Bani Isra'il and shows that the tribe is attributed to its elder of previous generations. Thus when a singular noun *walad* is mentioned it includes the subsequent generations. Ibn Qudama, *supra* note 7, 95-96.

[119] Kozlowski, *supra* note 5; Barnes, *supra* note 83; Reuter, *supra* note 29.

Economic historians lament the fact that the *waqf* failed to develop into a self-governing institution unlike its counterpart, the English trust. This is said to be because of two features of the *waqf*: its perpetuity and founder's freedom of choice to bind the *mutawalli*.[78] In addition to these two factors, general principles for dispute resolution also inhibited the development of a self-governing institution. The rights of beneficiaries were limited, as they could not bring a suit on their own. In case the *waqf* property is confiscated by someone, they could bring a suit only with the permission of the *qadi*.[121] Similarly, they did not have the power to nominate a *mutawalli* without the permission of the *qadi* despite the fact that jurists recognised their being better aware about the *waqf* and in a position to provide a better nomination.[122] Likewise, the powers of the *mutawalli* were limited with respect to the adjudication of *waqf* related disputes. Although he, not the beneficiaries, was the defendant in a suit against the *waqf*, he did not have authority to adjudicate disputes related to the *waqf* except where he was authorised by either state or custom.[123]

2.6. *The Dissolution of Waqf*

The majority of jurists despite regarding the perpetuity and irrevocability as fundamental conditions for the validity of a *waqf* envisage certain circumstances under which a *waqf* can be dissolved. The Hanafis allow a founder who is inflicted with poverty to get his *waqf* cancelled by the *qadi*.[124] Second instance for the dissolution of *waqf* arises when the *waqf* property is either completely destroyed or damaged to an extent that it can no longer be used or exploited in the way envisioned by the founder. Muhammad al-Shaybani holds that in this case, the *waqf* ceases to exist and the remains of the property revert to the founder or his heirs.[125] Other jurists, however, assert that no possibility of alternative use or exploitation must be left unexplored before the *waqf* is dissolved. The *waqf* of a mosque however, never dissolves under any circumstances.

The *waqf* becomes void if the founder apostatises, as the purpose of a *waqf* is *qurba ilā Allāh* (seeking the pleasure of God). The *waqf* property

[121] Kamali, *supra* note 3, 278.
Al-Shaykh Bajam, *supra* note 7, 1026.
[122] *Ibid.*, 999-1000.
[123] *Ibid.*, 1013-1014.
[124] *Ibid.*, 1045.
[125] *Ibid.*, 1042.

and by testament cannot exceed more than one-third property of the founder. This is the unanimous position of all jurists.

As mentioned above, one other important rule of inheritance, which comes into conflict with the *waqf* law, is that no will can be made in favour of legal heirs. In this context, the validity of a *waqf* in favour of legal heirs was questioned as it continues to operate after the death of the founder. Some jurists allowed this, arguing that the *waqf* is not a *mirath* (will), as it can neither be sold nor inherited and the *waqf* property is not owned by the beneficiaries. This view is attributed to Shāfiʿī. Other jurists do not allow this as the *waqf* is like a gift and the usufruct of the *waqf* property also falls under the prohibition of inheritance law.[45] This is the view of Ahmad ibn Ḥanbal.[46] However, the majority of jurists seem to have allowed such *waqf*.[47]

Under the Islamic law of gifts, a gift can only be made to an existing person. Thus the *waqf* violates this limitation as the founder donates to his progeny that is non-existent at the time of the creation of a *waqf*. The Ḥanafīs and Mālikīs do not require that the beneficiaries of a *waqf* must exist at the time of the creation of a *waqf*. Thus a *waqf* for unborn children is valid. The Shāfiʿīs[48] and Ḥanbalīs regard such a *waqf* as invalid. The latter, however, regard a *waqf* for children in womb as valid.[49]

About the status of the *waqf* in Islamic law, there can be three possibilities: one, it falls under the law of gifts; second, it falls under the law of charity; and third, it falls under the law of inheritance. The first proposition is supported by Shafiʿī. According to him, gifts have three types: two are *inter vivos* and one testamentary. The *inter vivos* are either ordinary gifts, which require making of gift along with the transfer of possession, or they are *sadaqa muharrama*, which takes effect by mere pronouncement

[45] Mālikī jurists, though, regarded a *waqf* in favour of legal heirs as invalid declared it valid if it was made in favour of grandchildren (their shares have not been determined by the Qurʾān and thus this prohibition does not apply). As parents are the guardians of minors, so sons and daughters, legal heirs, benefitted from the *waqf* property. Ahmad ibn Yaḥyā al-Wansharīsī, *supra* note 46, 3: 512; D.S. Powers, "The Islamic Family Endowment (*Waqf*)" (1999) *32 Vanderbilt Journal of Transnational Law* 1167, 1180. For an earlier version of this article, see D.S. Powers, "The Mālikī Family Endowment: Legal Norms and Social Practices" *International Journal of Middle East Studies* 24 (1992): 379.

[46] Ibn Qudāma, *supra* note 17, 2: 218–219.

[47] *Fatāwā al-Ālamgīriyya* refers to the opinion of Hilāl as an authority on this point: *supra* note 7, 4:375.

[48] Nawawī, *supra* note 2, 230.

[49] Al-Zuḥaylī, *supra* note 13, 7:7611–7615.

will be subjected to inheritance law, whether he is killed because of apostasy, or dies or reconverts to Islam.[114] However, the *waqf* created by a woman is not affected by her apostasy, as she is not liable to death punishment because of her apostasy.[115] This rule shows that the relationship of the founder with the *waqf* property does not terminate.[116] The earliest mention of this rule in the Ḥanafī tradition is found in the third century treatise, *Kitab Aḥkām al-Awqāf* of Al-Khaṣṣāf, who quotes Abū Ḥanīfa's view that the apostate cannot exercise his right on his property and even if he does so such transactions are void. Abū Yūsuf, on the other hand, regards such transactions as valid. Al-Khaṣṣāf, however, does not mention that the *waqf* made by a woman does not dissolve and for this the *Fatāwā al-Ālamgīriyya* quotes the sixteenth century treatise, *Baḥr ar-Rā'iq* of Ibn Nujaym (d. 970/1563).[117]

According to the Mālikīs, a *waqf* can be made for a limited period of time and in favour of a specified number of beneficiaries. It becomes extinct when the last of them dies or the specified period expires. The *waqf* property then returns to the founders or to their heirs. The *waqf* can also be revoked by the founders if they stipulate in the *waqf* deed that the property will return to them or it may be sold in case they need it. Other schools do not agree with the Mālikīs on this point.[118]

The *waqf* by an insolvent person is void. In case it is not clear whether the debt was incurred before or after making a *waqf*, the *waqf* is void as it is a charity and return of debt is an obligation. This is the Mālikī view.[119] As a matter of policy, law could not allow the use of *waqf* to defraud creditors. The classical Islamic law took into account this aspect of *waqf* and disallowed a *waqf* of an insolvent person who used *waqf* in order to defraud his

[114] The property of the *waqf* made void because of apostasy does not reconvert into a *waqf* with his reconversion to Islam rather it is required to be renewed as a *waqf*. Aḥmad ibn ʿUmar al-Khaṣṣāf, *supra* note 75, 351.

[115] Al-Shaykh Niẓām, *supra* note 72, 958 and Ibn al-Humām, *supra* note 17, 87.

[116] This has significant implications in cases where the founder becomes insolvent and creditor wants to attach *waqf* property. Surprisingly this issue does not find any mention in an otherwise very comprehensive code, the *Fatāwā al-Ālamgīriyya*. This is surprising because there are a large number of cases in colonial India where the creditor is a plaintiff against the insolvent founder of the *waqf* who claims to disown the *waqf* property. See for details, Kozlowski, *supra* note 3; S.K. Rashid, *Wakf Administration in India, A Socio-Legal Study* (New Delhi: Vikas Publishing House Pvt Ltd, 1978).

[117] Al-Shaykh Niẓām, *supra* note 72, 958.

[118] Al-Zuhaylī, *supra* note 63, 7668.

[119] *Ibid.*

creditors. However, once dedicated, the property ceased to belong to the founder. Therefore, a *waqf* created by a solvent person cannot be claimed by his creditors, nor can a subsequent purchaser for consideration of *waqf* property set aside the *waqf*.[13]

2.7 *The Place of Waqf in Islamic Law*

It is not easy to determine the status of the *waqf* in Islamic law because it resembles various legal categories such as *sadaqa* (charity), *hiba* (gift) and *mawarith* (inheritance). In fact, the *waqf* operates under all these categories and also comes into conflict with them. The most significant conflict is with inheritance law (*mawarith* or *faraid*) as this branch of Islamic law is based on the clear and strict provisions of the Qur'ān itself. The Qur'an explicitly lays down the portion of each legal heir after the death of a believer. However, believers are free to donate as much of their property as they wish during their lifetime until terminal illness (*maraḍ al-mawt*) approaches them. The legal rule prohibits the exercise of the right of alienation of property exceeding one-third during terminal illness.[14] Believers are strongly advised to leave a written will[15] and make *sadaqa* (charity) during their lifetime,[16] however, their right to dispose of their property by will is limited to the one-third of their property. Another restriction is that no will in favour of legal heirs can be made as their rights are already determined by law.[17]

[13] The *waqf* of an indebted person is valid though it might be in his own favour. Abu Sa'ūd was of the opinion that a person who is heavily involved in debt if he creates a *waqf* with the objective of defrauding the creditors, the *qāḍī* is empowered to refuse to recognise his *waqf* and compel him to sell his property to pay his debt. Ali, *supra* note 1, 205-211.

Muhammad ibn Ismā'il Bukhārī, *Ṣaḥīḥ al-Bukhārī*, *supra* note 14, 3-6.

[14] Al-Baqara: 180, 182.

[15] Muhammad ibn Ismā'il Bukhārī, *Ṣaḥīḥ al-Bukhārī*, *supra* note 14, 6.

[16] Historians of Islamic law such as Powers, Yanaghashi, Crone and Hennigan have looked into the development of "Islamic inheritance system". Hennigan finds that *waqf* law emerged in the shadow of such established doctrines as inheritance law, bequests and terminal illness. The *waqf* was distinguished from inheritance and bequest but it remained subordinate to these established doctrines. Hennigan, *supra* note 1, 104-105. D.S. Powers, *Studies in Qur'ān and Ḥadīth. The Formation of the Islamic Law of Inheritance*. Berkeley, CA: University of California Press, 1986); H. Yanaghashi, "Doctrinal Development of *Marāḍ al-Mawt* in the Formative Period of Islamic Law", *Islamic Law and Society* 5 (1998) 326. P. Crone, *Roman, Provincial and Islamic Law. The Origins of the Islamic Patronate* (Cambridge: CUP, 1987).

Thus the family *waqf* comes into direct conflict with inheritance law, as the founder creates an interest in favour of his children irrespective of the limitations imposed by the Qur'ān. Therefore, some jurists questioned the legitimacy of the *waqf* in favour of family members in the early days of Islam.[37] However, not only the Prophet himself but a great number of his Companions also alienated their properties as *sadaqa, waqf, habs*. All these alienations were made as acts of piety, whether to benefit the family members or community in general. A recurring theme in Hadith literature on charity is that it begins at home.[38] Therefore, despite this significant conflict within various branches of Islamic law, the *waqf* flourished and the majority of jurists endorsed it as not only valid but also pious. In fact, among other types of charity the *waqf* is given preference because of its continuity and perpetual nature.[39]

However, the problem of *waqf* being used to curtail the inheritance law and especially to deprive women of their share in inheritance became evident in the early period of Islam during the lifetime of the Companions of the Prophet. A large number of Companions of the Prophet established *awqāf* and one Companion Jābir is quoted to have said that there was no Companion left who had means and he did not establish a *waqf*.[40] There is no evidence about the existence of this problem or about its future occurrence during the lifetime of the Prophet. The earliest mention of this problem in the *Fiqh* literature is found in *Al-Mudawwanat al-Kubrā* where in the chapter of *abwāb* (pl. of *bāb*) one heading reads: "the *habs* for sons, exclusion of daughters, exclusion of some of them; and division of *habs*". Under this heading, the *waqf* of many prominent Companions of the Prophet such as 'Uthmān Ibn Affān, Zubayr Ibn al-Awwām, Ṭalḥa ibn 'Ubayd ullah and Amr ibn 'Ās are mentioned. They made *waqf* in favour of their children without the exclusion of daughters. When 'A'isha, the wife of the Prophet, was told about this problem, she said that such was not the practice of the Companions. It is also mentioned that caliph 'Umar

[37] Most important amongst them was Qāḍī Shurayḥ, a prominent judge who based his opinion on the saying of the Prophet that there can be no *waqf* in conflict with the laws of inheritance. However, the authenticity of this saying is questioned by other scholars and jurists. See Al-Zuḥaylī, *supra* note 13, 7600.

[38] Muḥammad ibn Ismā'īl Bukhārī, *supra* note 34, 18-25.

[39] This is evident by the tradition of 'Umar who approached the Prophet asking for the best use of his property and was advised to make it a *waqf*. See also Al-Shaykh Nizām, *supra* note 17, 039 and 040.

[40] Al-Zuḥaylī, *supra* note 3, 7603.

ibn Abdul Aziz (reigned 99/717 to 101/720) intended to revoke the *sadaqāt* (*awqāf*) of the people who had excluded women. Thus the author concludes that the *sadaqāt* (*awqāf*) used to be in favour of both sons and daughters until people started to exclude daughters.[44]

This problem did not go unnoticed by the later jurists who advised that preferably the *waqf* should be in accordance with the shares provided under Islamic law of inheritance or it should be equally in favour of sons and daughters. However, given the fact that men have more financial obligations than women whose maintenance is the duty of men under Islamic law, the exclusion of women, especially daughters, was not regarded as invalid. It was argued that the Companion of the Prophet, Zubayr ibn al-Awām made a *sadaqa* (*waqf*) of his house in favour of his sons wherein his daughters had a right of residence until they got married and after marriage if they were divorced or became widows. Generally, jurists regard a *waqf* that is not in harmony with inheritance law as *makruh* (reprehensible) except where some children are more needy than the others.[45] However, it appears that the pious conscience of jurists continued to feel this conflict of laws and they tried to harmonise this conflict whenever an opportunity arose. Thus while discussing the circumstances where the specified beneficiaries die out, one view is that the *waqf* property is to be divided amongst the legal heirs of the founder according to their share in accordance with the inheritance law.[46] In this respect, the most interesting aspect of *waqf* law is the default rule. In the case where the shares of children are not determined by the founder, both sons and daughters have equal shares. This rule is derived from the tradition of the Prophet, which provides for the equal treatment of children.[47]

An important example of harmonisation between the *waqf* law and the inheritance law is the *waqf* made during terminal illness. The rule under inheritance law is that one's discretion to dispose of property during terminal illness is limited to one-third of total property. In case the disposal of property exceeds this limit, the consent of heirs is required. There is no such limit for a normal healthy person who can dispose of the whole of his property as a *waqf*. However, a *waqf* made during terminal illness

[44] Sulaymān ibn Sa'ūd, *supra* note 53, 423-424.
[45] Ibn Qudāma, *supra* note 7, 205-206.
[46] *Ibid.*, 213.
[47] Ibn Ābidīn, *supra* note 2, 664-665.

and by testament cannot exceed more than one-third property of the founder. This is the unanimous position of all jurists.

As mentioned above, one other important rule of inheritance, which comes into conflict with the *waqf* law, is that no will can be made in favour of legal heirs. In this context, the validity of a *waqf* in favour of legal heirs was questioned as it continues to operate after the death of the founder. Some jurists allowed this, arguing that the *waqf* is not a *wasiya* (will) as it can neither be sold nor inherited and the *waqf* property is not owned by the beneficiaries. This view is attributed to Shāfiʿī. Other jurists do not allow this as the *waqf* is like a gift and the usufruct of the *waqf* property also falls under the prohibition of inheritance law.[145] This is the view of Aḥmad ibn Ḥanbal.[146] However, the majority of jurists seem to have allowed such *waqf*.[147]

Under the Islamic law of gifts, a gift can only be made to an existing person. Thus the *waqf* violates this limitation as the founder donates to his progeny that is non-existent at the time of the creation of a *waqf*. The Ḥanafīs and Mālikīs do not require that the beneficiaries of a *waqf* must exist at the time of the creation of a *waqf*. Thus a *waqf* for unborn children is valid. The Shāfiʿīs[148] and Ḥanbalīs regard such a *waqf* as invalid. The latter, however, regard a *waqf* for children in womb as valid.[149]

About the status of the *waqf* in Islamic law, there can be three possibilities: one, it falls under the law of gifts; second, it falls under the law of charity; and third, it falls under the law of inheritance. The first proposition is supported by Shāfiʿī. According to him, gifts have three types; two are *inter vivos* and one testamentary. The *inter vivos* are either ordinary gifts, which require making of gift along with the transfer of possession, or they are *sadaqa muharrama*, which takes effect by mere pronouncement

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[145] Māliki jurists, though, regarded a *waqf* in favour of legal heirs as invalid; declared it valid if it was made in favour of grandchildren (their shares have not been determined by the Qurʾān and thus this prohibition does not apply). As parents are the guardians of minors so sons and daughters (legal heirs) benefited from the *waqf* property. Aḥmad ibn Yaḥyā al-Wansharīsī, *supra* note 36, 311-321; D.S. Powers, "The Islamic Family Endowment (*Waqf*)", (1999) *32 Vanderbilt Journal of Transnational Law* 1167, 1180. For an earlier version of this article, see D.S. Powers, "The Mālikī Family Endowment: Legal Norms and Social Practices", *International Journal of Middle East Studies* 25 (1993) 379.

[146] Ibn Qudāma, *supra* note 17, 317-319.

[147] *Fatāwā al-Ālamgīriyya* refers to the opinion of Hilāl as an authority on this point: *supra* note 17, 375.

[148] Nawawī, *supra* note 21, 230.

[149] Al-Zuḥaylī, *supra* note 13, 7640-7643.

like freeing of a slave. In the latter case, no transfer of possession is required and the donor becomes a complete stranger and if the property is damaged by him, he would be liable for it.[150] The *waqf* or *habs*, according to him, falls in the latter category. The second and third propositions are supported by the categorisation of *waqf* in the compilations of the traditions of the Prophet. Amongst the six most authentic books on the traditions of Prophet, the *waqf* is covered under the chapter of *Al-wasāyā* (wills) in three of them: *Sahih al-Bukhāri*, *Sahih Muslim* and *Sunan Abi Da'ud*. While *Sunan Ibn Mājah* includes it in *Kitāb al-Sadaqāt* (charity).[151]

There is, however, a fourth possibility of *waqf* being an independent branch of law within Islamic law. It might not have existed as such during the lifetime of the Prophet and early days of Islam. However, in the later periods it developed into a separate branch. This hypothesis is supported by *Al-Mudawwana al-Kubrā*, which distinguishes between *sadaqa* and *waqf habs*. Al-Mughni of Ibn Qudāma also distinguishes between the *waqf* and *sadaqa*. The latter becomes *lāzim* (binding) with the mere utterance of making a *sadaqa* unlike the former.[152] Two of the six compilations on the traditions *Sunan al-Nasā'I* and *Sunan al-Tirmidhi* have a separate section on *waqf*. *Sunan al-Nasā'I* has a specific chapter for *waqf* with the name of *Kitāb al-Ahbās* and *Sunan al-Tirmidhi* has a section on *waqf* in the chapter captioned as *"Kitāb al-Ahkam 'an al-Rasūl"* (Injunctions from the Prophet). An important collection of traditions *Subul al-Salām* also has a separate chapter on the *waqf*.

This classification in the books of traditions of Prophet, however, does not seem an appropriate criterion for judging the status of the *waqf* within Islamic law. The classification in *Fiqh* books could have provided a better criterion. But given the parallel developments in various branches of law and the difference of subject matters dealt by each branch, it is difficult to establish a formal hierarchy. However, even if the *waqf* law could have grown into a separate branch within the Islamic legal system, it is clear that it is subservient to inheritance law to the extent that the testamentary *waqf* is limited to one-third of the founder's property in accordance with inheritance law. Secondly, the inheritance law rule, which forbids a will in favour of a legal heir does not apply to *inter vivo waqf* as it is not a will.[153]

[150] Al-Shāfi'i, *supra* note 28, 274.

[151] See *supra* note 34.

[152] Ibn Qudāma, *supra* note 17, 185.

[153] Hennigan argues that by shifting the discourse of *waqf* from inheritance to an *inter*

Conclusion

The above study shows that the bulk of *waqf* law is derived by using legal techniques such as *qiyās* (analogy) and *istiḥsān* (juristic preference). In the later period, *'urf* (custom) also became an important source for the determination of specific legal problems. Thus we find a legal maxim in juristic treatises, *thābit bi al-'urf ka al-thābit bi al-shart* (what is established by virtue of custom is like what is established by virtue of an agreed condition). Custom was also incorporated into law under the principle of *istiḥsān* (juristic preference) and principle of *maṣlaḥa* and *ḍarūra* (public good and necessity).[154] Evidence from court cases suggests that disputes were decided according to *'urf* (custom) where Shari'a provided no specific injunction.[155]

Despite the voluminous treatment of *waqf* in the *Fatāwa al-'Alamgiriyya*, which comprises fourteen chapters and several subsections, it is clear that this is not a complete and exhaustive exposition of *waqf* law. Historical accounts on the administration of justice in the Muslim world inform us about the existence of imperial decrees (*fermān* or *qānūn*), which regulated the mundane affairs of state.[156] The Ijāratayn Law was enacted in the Ottoman Empire after the year 1610 AD (1020 AH) which was compiled "as far as possible, according to the principles of Sheri'". Later on the "customs and usages were, after being sanctioned by Imperial Irades, recorded in the books of the Courts and the Government offices".[157] An Ottoman Imperial decree prohibiting the *qāḍī* to validate and register as *waqf* the property of a debtor is also found in historical records. This decree was issued by the Ottoman Sultān Sūlaymān the Magnificent (reigned 926-974/1520-1566).[158]

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since charitable gift, jurists trumped the criticism that the *waqf* violates inheritance law. Heneigan, *supra* note 1, 94.

[154] G. Libson and E.H. Stewart, "'Urf", *Encyclopaedia of Islam*, 2nd edn. (2011) http://www.brillonline.nl/subscriber/entry?entry=islam_COM-1298 (accessed 10 May 2011).

[155] N. Hanna, *Making Big Money in 1600* (Cairo: The American University of Cairo, 1998) xxi.

[156] A.A.A. Fyzee, "Muhammadan Law in India", (1963) 5 *Comparative Studies in Society and History* 401, 404.

[157] These statements are taken from the introduction of Omer Hilmi Effendi's book, which he claims to have written as a result of his service in the offices of the Sheykh-ul-Islam, and after obtaining practice in the affairs of Evqaf during a period of nearly twelve years when he acted as the Secretary and Inspector of the Court of Tefrish, and also as the Sheri' officer for Public Titles. O.H. Effendi, *A Gift to Posterity on the Laws of Evqaf translated by C.R. Tyser and D.G. Demetriades* (Nicosia: Government Printing Office, 1922) B.

[158] Imber, *supra* note 1, 142.

It is interesting to note that both the customary laws and imperial decrees are missing from the legal treatises discussed in this article. These treatises mention that the customary practices should be taken into account in certain circumstances, *e.g.*, for the interpretation of the clauses of the *waqf* deed. They also refer to the powers of rulers regarding certain *waqf* related matters. However, there is no mention of imperial decrees even in the *Fatāwā al-ʿĀlamgīriyya*, the compendium compiled by the order of the Emperor. This fact is intriguing and raises questions about the extent to which the law in *Fiqh* books reflected the actual practice. This also raises questions about the role of Islamic law contained in *Fiqh* books in the governance of state and society in conjunction with other governance mechanisms within the prevailing legal system.

Apart from discovering the incompleteness of *waqf* law contained in the *Fiqh* texts, this article has also identified inconsistency in the legal theory of *waqf*. Throughout their works, Muslim jurists seem to have been struggling with the issue of the ownership of *waqf* property and its relationship with the stakeholders of the *waqf*. The resolution of this issue was crucial in order to empower each stakeholder to have his say in the operation of the *waqf* according to his share. The majority of jurists hold that the *waqf* property is transferred to God, yet the *waqf* dissolves with the apostasy of the male founder. Moreover, in case the founder becomes destitute, he can approach the court for the cancellation of his *waqf*. This rule seems reasonable as there is no point to operating a charitable institution in favour of others when the original owner or the founder becomes more deserving. However, the *qāḍī* is also required to appoint a *mutawallī* from amongst the family members of the founder and in case the *waqf* property becomes useless for the stated objectives, according to some jurists it reverts to the founder and his legal heirs. The stipulations of the founder are also required to be strictly followed as if he continues to own *waqf* property even after death. This lack of clear determination of the ownership of *waqf* property caused many legal and economic problems, which became manifest with the passage of time especially when Islamic law confronted civil and English law during colonisation.

The third finding relates to the status of the *waqf* in Islamic law. Unlike the law of inheritance, the *waqf* law developed gradually and in certain cases it came into conflict with other branches of Islamic law. It was also abused to deprive women of their share in inheritance. At the same time, *waqf* law provided equality of treatment for both sons and daughters as a default rule, unlike the inheritance law, which provides sons with double the share of daughters. Jurists were cognizant of this conflict, and tried to harmonise both branches whenever an opportunity arose.